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FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

MAY 07 2001

JAMES R. LARSEN, CLERK  
DEPUTY  
SPOKANE, WASHINGTON

6 UNITED STATES DISTRICT COURT  
7 EASTERN DISTRICT OF WASHINGTON

8 ALFRED P. CHRISTOFFERSEN, et  
al.,

9 Plaintiffs,

10 vs.

11 WASHINGTON AIR NATIONAL  
12 GUARD, et al.,

13 Defendants.

NO. CS-01-0010-AAM

DEFENDANTS' REPLY TO  
PLAINTIFFS' RESPONSE TO  
DEFENDANTS' MOTION TO  
DISMISS

14 The United States of America by and through James R. Shively, United  
15 States Attorney for the Eastern District of Washington, and Rolf H. Tangvald,  
16 Assistant United States Attorney, respectfully submits this Reply To Plaintiffs'  
17 Response To Defendants' Motion To Dismiss Complaint.

18 **ARGUMENT**

19 **A. The Nature of Defendants' Motion**

20 Plaintiffs assert that Defendants' motion to dismiss should be more properly  
21 categorized as a motion for summary judgment in accordance F.R.C.P. 56. They  
22 are incorrect. The central focus of Defendants' motion to dismiss is (1) this court  
23 lacks jurisdiction over the subject matter of this complaint, and (2) Plaintiffs have  
24 failed to state a claim upon which relief can be granted. As such, Defendants'  
25 motion falls squarely within the ambit of F.R.C.P. 12 (b)(1) and (6) and is properly  
26 characterized as a motion to dismiss.

1 Plaintiffs allege Defendants have relied “extensively” on matters outside the  
2 pleadings and have not attached affidavits or other forms of documentary evidence  
3 to their motion to dismiss. A review of Defendants’ motion does not bear this  
4 allegation out. Pages 1-6 of the motion contain a factual history of the case.  
5 Pages 6-14 contain Defendants’ legal arguments as to why this court lacks  
6 jurisdiction and why Plaintiffs have failed to state a claim. Defendants’ response  
7 directly corresponds to pleadings Plaintiffs make in their Complaint for  
8 Declaratory Judgment. Plaintiffs allege this Court has Jurisdiction (pages 1-5 of  
9 Plaintiffs’ Complaint). The United States’ motion illustrates why this Court lacks  
10 jurisdiction (see pages 6-8 of Defendants’ Motion to Dismiss and F.R.C.P.  
11 12(b)(1)). Plaintiffs allege a “case or controversy exists” between the parties  
12 (page 14 of Plaintiffs’ Complaint). The United States’ motion illustrates why no  
13 case or controversy exists. (See pages 8-12 of Defendants’ Motion to Dismiss and  
14 F.R.C.P. 12(b)(1) and (6)). The pleadings clearly demonstrate that the United  
15 States sets forth dismissal matters based on the pleadings rather than on matters  
16 more appropriately reviewed on a motion for summary judgment.

17 Plaintiffs take umbrage with the United States recitation of the procedural  
18 history explaining the journey this matter has taken before arriving in this court. It  
19 is appropriate for the court to know that no federal defendant exists in any pending  
20 litigation and that Plaintiffs have lost each and every claim they have litigated  
21 against the United States over the past 20 years in this matter. The procedural  
22 history in this matter should not be hidden from the court. Moreover, while  
23 advising the court of the procedural history, the United States has in no way relied  
24 on it or on matters outside the pleadings to support its dismissal motion. This  
25 matter should be dismissed on the face of the pleadings. That is what the United  
26 States requests.

1        Instead of determining the dismissal matters, Plaintiffs desperately urge the  
2 court to consider the United States' motion as one for summary judgment. Why?  
3 The answer is clear. Plaintiffs want an opportunity to focus the court on the facts  
4 of the case rather than allow the court to first appropriately determine if the matter  
5 is properly before it. Plaintiffs want this court to put the cart before the horse.  
6 The court should resist such an appeal and, instead, follow the time-tested  
7 approach of first independently determining the dismissal issues. If the court  
8 determines that this matter is correctly brought before it, the United States will file  
9 its summary judgment motion, supported by the facts as required by F.R.C.P. 56.  
10 The court's threshold consideration of this dismissal motion is appropriate.

11        **B. Which Party is Filing the Motion to Dismiss**

12        Plaintiffs seem confused as to who the Federal Defendants are in this action.  
13 This is odd given the fact that in its answer, the United States identifies the  
14 Federal Defendants as the National Guard Bureau and the United States Air Force.  
15 The answer further clarifies that the Adjutant General for the Washington Air  
16 National Guard lacks authority to commit the federal government to payments  
17 under The Back Pay Act. To the extent that Major General Timothy J. Lowenberg  
18 asserts a contrary position, he has every right to follow the proper procedure for  
19 requesting representation if he feels he is being sued for actions taken within the  
20 scope of his employment as a federal employee. Once General Lowenberg follows  
21 the proper procedure, the United States Attorney will determine if he was within  
22 the scope of his employment for purposes of determining representation. The  
23 undersigned has advised that General Lowenberg should contact his federal  
24 agency to initiate the representation request if he deems it is appropriate. It is  
25 curious that he has not yet done so.

1 Plaintiffs seem to believe their inclusion of Major General Lowenberg and  
2 the Washington Air National Guard as named defendants in this action somehow  
3 confers a federal agency status upon them that requires the Department of Justice  
4 to automatically take up their cause. They are mistaken. The motion to dismiss is  
5 brought on behalf of the National Guard Bureau and the United States Air Force.

### 6 **C. Jurisdiction**

7 Plaintiffs insist they are not seeking a monetary judgment against the federal  
8 government under The Back Pay Act, (see page 4, of Plaintiffs' response) but  
9 rather seek only a declaration that the Adjutant General for the State of  
10 Washington has authority to make awards under that Act. This assertion is  
11 disingenuous. Are Plaintiffs really suggesting that if the United States refuses to  
12 fund a back pay determination made by the State Adjutant General, they will not  
13 immediately return to this court seeking an enforcement order against the National  
14 Guard Bureau and the United States Air Force for the payment of such monies?  
15 The only logical conclusion that can be drawn from Plaintiffs' persistence in  
16 pursuing this action, particularly in light of the fact there are no federal defendants  
17 in their State court action, is they want money. They want a source of funding for  
18 their claims against the State of Washington. Plaintiffs' insistence that they do  
19 not want money from the United States when in reality that is exactly what they  
20 are pursuing is driven by their desire to keep the case out of the only court that  
21 properly has jurisdiction, the United States Court of Federal Claims. They want to  
22 avoid the Court of Claims because they know the prior decision of that court is res  
23 judicata against them. See Christoffersen, et al. v. United States, 230 Ct. Cl. 993  
24 (1982) (WL 25304).

25 Instead of making a proper claim in the proper forum, Plaintiffs' attempt to  
26 tiptoe through the most amazingly circuitous route in order to foist the matter upon  
27

1 this court and somehow manage to have their cake and eat it too. That is, they  
2 want to avoid the exclusive jurisdiction of the Court of Federal Claims, yet receive  
3 a money judgment against the federal government. Unfortunately for Plaintiffs,  
4 because their claims exceed \$10,000, the Tucker Act precludes such a result. See  
5 28 U.S.C. §§ 1346 (a)(2). (See also, the discussion on pages 6-8 of Defendants'  
6 motion to dismiss.) Any determination that is ancillary to Plaintiffs' pursuit of  
7 money damages under the Federal Back Pay Act should be referred to the U.S.  
8 Court of Federal Claims. This Court lacks jurisdiction.

9 **D. Plaintiffs Lack Standing to Sue**

10 At page 5 of their response to Defendants' Motion to Dismiss (lines 13-19)  
11 Plaintiffs state:

12 It is the federal government's "agent" MG Lowenberg who is asserting  
13 authority to act which the U.S. Air Force denies. This assertion  
14 creates the controversy. Moreover, the federal government's answer  
15 denies MG Lowenberg is a federal agent. His status alone creates the  
16 case in controversy for resolution by this Court.

17 Plaintiffs' own words express most eloquently the true nature of this  
18 controversy. The controversy, such as it is, exists between the United States Air  
19 Force, the National Guard Bureau, and the State of Washington. It is not between  
20 the Plaintiffs and the Federal Defendants. Any issue between Plaintiffs and the  
21 Federal Defendants were resolved long ago before the Court of Claims and the  
22 Ninth Circuit Court of Appeals.

23 A dispute between parties named as co-defendants, by itself, cannot confer  
24 standing upon an opposing Plaintiff. Plaintiffs' standing is dependent upon  
25 having a dispute of their own with the Defendants. Secretary of State of  
26 Maryland v. J.H. Munson, 467 U.S. 947, 954, 81 L.Ed. 2d 786, 104 S. Ct. 2839  
27 (1984). In order to establish standing on their own, Plaintiffs must allege an  
28 "injury in fact" that is (a) concrete and particularized and (b) actual or imminent,

1 not conjectural or hypothetical. Government Employees Insurance Company v.  
2 Dizol, 133 F.3d 1220, 1228 (9<sup>th</sup> Cir. 1998) (citing Lujan v. Defenders of Wildlife,  
3 504 U.S. 555, 560-61 112 S.Ct. 2130, 2136, 119 L.Ed. 351 (1992)).

4 Here, Plaintiffs purported “injury” is an alleged argument the State  
5 of Washington is making in the State court action. (See Plaintiffs’ Response,  
6 pages 5-6). Assuming arguendo that the State of Washington is in fact making  
7 such an argument, Plaintiffs have offered nothing to suggest the State court has  
8 issued any ruling, preliminary or otherwise, that threatens their case. Any “injury”  
9 is merely “conjectural,” is not “concrete,” and is not “imminent,” and fails to meet  
10 the strictures of Dizol and Lujan.

#### 11 **E. Plaintiffs’ Claims Are Moot**

12 This declaratory judgment complaint became moot when the State of  
13 Washington lost their bid to remove the pending State action to the federal court  
14 and to substitute the United States as defendant. The defendants in the State court  
15 action are the State of Washington, the Washington State Militia, the Washington  
16 Air National Guard, and the Adjutant General of Washington State. Plaintiffs  
17 have admitted repeatedly that no federal defendants exist in their State court  
18 action. The bases for the State court lawsuit are exclusively State law principles.  
19 There are no federal claims. Consequently, the only interests MG Lowenberg can  
20 possibly be representing in the State court action are the interests of the State of  
21 Washington and the Washington Air National Guard, not the federal government,  
22 and certainly not the United States Air Force and the National Guard Bureau.

23 Second, Plaintiffs admit they are not seeking recovery under The Back Pay  
24 Act in the State court proceeding. The State court proceeding is the only pending  
25 litigation on the merits. The fact that Plaintiffs do not currently seek recovery  
26  
27

1 under The Back Pay Act from anyone moots the issue of who can make Back Pay  
2 Act determinations.

3 **CONCLUSION**

4 Plaintiffs are attempting an end-run of around twenty years of adverse  
5 decisions in federal court uniformly holding they cannot recover damages from the  
6 United States. Plaintiffs' current action is brought before the wrong court because  
7 Plaintiffs didn't like the result in front of the proper forum, the Court of Claims.  
8 Jurisdiction is improper.

9 Additionally, Plaintiffs have no litigation pending anywhere against the  
10 United States. They allege no controversy with the United States. They lack  
11 standing to maintain this action.

12 Finally, Plaintiffs have no litigation pending anywhere alleging recovery  
13 under The Back Pay Act. The Court of Claims has ruled in favor of the United  
14 States when Plaintiffs properly took the matter before it. Since no action exists  
15 under The Back Pay Act, the question of whom can award damages under the Act  
16 is moot.

17 The United States respectfully requests dismissal of Plaintiffs' action.

18 DATED this 7 day of May, 2001.

19 JAMES R. SHIVELY  
20 United States Attorney

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22 ROLFE H. TANGVALD  
23 Assistant U. S. Attorney  
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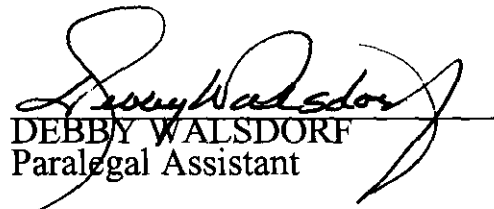
1 I hereby declare under penalty of perjury, pursuant to 28 U.S.C. §1746, that  
2 on this 7-14 day of May, 2001, I served a copy of DEFENDANTS' REPLY TO  
3 PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS upon  
4 counsel in the manner indicated below:

- 5 ☒ First Class Mail  
6 ☐ Facsimile  
7 ☐ Overnight Delivery  
8 ☐ Hand Delivery

C. Matthew Andersen  
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